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# Liberal Neutrality and Charitable Purposes

## Introduction

Influential streams of liberal political thought have argued that the state ought to be a neutral set of institutions that do not pursue or impose particular conceptions of the good. According to this perspective, the state does not have purposes of its own or pass judgement on what it means to lead the good life. As Jonathan Quong summarises, a liberal state should be limited to ‘a fair framework of rules and institutions to regulate the distribution of the burdens and benefits of social cooperation’. The neutral framework is one ‘within which each citizen is allowed to pursue their own conception of the good life, whatever that may be’ (Quong, 2005: 302). Many liberals similarly defend, in some form or another, state neutrality.

Charitable or altruistic activity is widely regarded as a valuable component of civil society<sup>1</sup> and such activity should be facilitated (see Titmuss, 1970). In UK law, the distinctive status of charitable organisations within civil society is promoted by state recognition and fiscal support, among other measures. Yet, with the designation of charitable status, the state is granting a set of privileges to organisations that pursue particular purposes deemed as ‘charitable’. In granting charitable status the state makes a value judgement about certain goods; it tells us that a given set of conceptions are worthy of special provisions, such as tax exemptions, that are not available to the pursuit of other conceptions. In short, the legislation appears to contravene liberal neutrality.

The task of this paper is twofold. First, to explicate the *prima facie* tension between charity law and liberal neutrality. Second, to provide some insight into whether or not the two can be reconciled by exploring various conceptions of liberal neutrality. Underlying these two tasks is a methodological issue, namely what would count as a *satisfactory* reconciliation between liberal neutrality and charity law. I shall employ a particular version of reflective equilibrium, considering the neutrality theory against the well-established principles of charity law, adjusting the former or latter where seems appropriate. Thus, neither the theory nor the principles are taken as trumps. It seems reasonable to expect there to not being a single, unified conception that satisfies all examples of charitable activity. I anticipate only partial consistency and so there will inevitably be loose ends. For that reason, the paper’s conclusion is in the conditional: if one is a neutralist then one must be prepared to exclude some present categories and reform others. If, on the other hand, one is persuaded more by the tradition and/or value of the present categories then one must jettison neutrality. To provide some context to the problem I will first briefly outline elements of charity law.

## Charity Law

In UK law, the formal definition of charitable purposes can be traced back to the *Statute of Charitable Uses 1601* (1601 Act hereafter). The act sought first to direct funds towards

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I am indebted to Albert Weale for his time and comments on many drafts of this paper. I would also like to thank the anonymous referees, Robert Jubb and the UCL Political Theory Workshop for their comments and criticisms.

<sup>1</sup> Some may find this controversial, particularly those who subscribe to a ‘justice not charity’ view. Typically this view uses ‘charity’ in the sense of ad-hoc, perhaps pity-based, material giving – hence the demand for justice *not* charity. This paper refers to the public policy understanding of charity; identified by the purposes set out in Table 1 below.

identified purposes such as social care and second, to reform abuse of property given to charities by identifying certain purposes that would thereafter be known as charitable. The preamble to the *1601* Act sets out such purposes, ranging from the relief of the poor to the repair of highways and bridges. The list was not intended to be exhaustive of charitable purposes but as illustrative for the judiciary in future case law. It is interesting to note that a sense of ‘social control’ features in the *1601* Act, such as helping poor maids into marriage and the rehabilitation of prisoners. Kerry O’Halloran notes such purposes indicate a ‘legislative intent to promote congruity between the agendas of charities and government on the assumption that both share a common interest in activities which conform with and tend to preserve the values of contemporary society’ (O’Halloran, 2007: 63). It suggests a pattern of thought in the legislation where the state promotes certain activities it believes to be worthwhile.

For four centuries the definition of charitable purposes was explicated in a body of case law, where for a purpose to be charitable it would need to come within the ‘spirit and intendment’ of the *1601* Act preamble. In *Commissioners for Special Purposes of Income Tax vs. Pemsel* (1891), Lord Macnaghten extracted four heads of charitable purposes from the *1601* Act: the relief of poverty, the advancement of education, the advancement of religion and other benefits to the community not covered by the preceding categories. The *1601* Act, *Pemsel* and subsequent case law formed what would become long-standing principles in the classification of charitable purposes, namely that they must be provided for the public benefit, that they must be exclusively charitable and conform to Macnaghten’s four heads or the ‘spirit and intendment’ rule.

Nevertheless charity law was not a unified body of jurisprudence and charitable purposes still eluded legislative definition. The Charities Act 1992 and 1993 sought to bolster the supervision and support of charities but avoided definitional matters so as not to risk the flexibility of charity law to keep pace with contemporary society. The Charities Act 2006 (2006 Act hereafter) was introduced primarily to reform the complex and confused system of governance for charitable organisations in England and Wales<sup>2</sup>. The 2006 Act introduced, among other provisions, a new extensive list of charitable purposes and maintained the principles of being exclusively charitable and for the public benefit. Thus, there is now an explicit classification of charitable purposes on the statute books. Prior to the 2006 Act, organisations that engaged in the charitable purposes endorsed in *Pemsel* were assumed, by virtue of having those purposes, to be charitable. The 2006 Act removed the presumption that the above provide public benefit and so now *all* organisations seeking to remain or become charities are required to meet a public benefit test. The 2006 Act explicitly defines a charitable purpose as one that falls within the list of thirteen categories contained in the legislation, including the *Pemsel* categories of poverty relief and the advancement of education or religion. Additional categories include the advancement of health, the advancement of the arts, and the advancement of human rights or equality.

**[Table 1 here]**

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<sup>2</sup> England and Wales form a single jurisdiction in charity law. For the sake of clarity and to keep the scope of this paper manageable I shall focus solely on the charity law of England and Wales. I see no reason why, in theory, the principles could not be applied elsewhere. It should be noted, however, that using the reflective equilibrium method might yield a proposal more in favour of neutrality were charity to be a significantly less important institution than it is in the UK.

The tension between charity law and liberal neutrality comes to light when we see that the legal recognition of charitable status is not a value-free decision. Such decisions tell us that the pursuit of particular conceptions of the good is worthy of special advantages that are not granted for the pursuit of other conceptions. Fiscal advantages, such as tax exemptions, ease their pursuit while the granting of charitable status itself provides a level of approval from the state<sup>3</sup>. The purpose of this paper is to survey how the liberal neutralist might account for the granting of these special advantages. At this point it is helpful to explicate the theoretical background.

## Neutrality

Neutrality is a familiar concept that is applicable in a variety of contexts. Our common understanding relates to an agent's non-involvement in a dispute concerning two or more other agents. The political context in which it is perhaps most familiar is international relations. Here a neutral state is one that refrains from taking sides in an international dispute or conflict such as Switzerland during World War II. The context that concerns us here is *within* the modern state. As Peter Jones states, 'within liberal political theory, the phrase neutral state has come to describe not the external posture of a state but an idea of what its *internal* arrangements should be' (Jones, 1989: 9 emphasis added). The discussion of neutrality in this *internal* sense (and as a defining characteristic of liberalism) is widely regarded to have surfaced in the 1970s in significant works by Ronald Dworkin, John Rawls and others (Wall & Klosko, 2003b: 1-2; Goodin & Reeve, 1989b: 1). Its emergence correlates with the understanding of the plurality of conceptions of the good as a permanent and desirable feature of modern societies (Larmore, 1987: 43; Kukathas, 1992: 228-30).

But what is meant by conception of the good in this context? Neutralists (and non-neutralists) are often vague in their definition and use it interchangeably with other related terms such as ideas, values and beliefs. Following the consensus, I shall consider it to include not only comprehensive moral, religious and philosophical doctrines but also 'ordinary' or 'everyday' judgements about which activities or ideals are worthwhile or important. This approach does not privilege loftier or broader questions about the good over everyday ones; the former might include 'what virtues should I cultivate?' and the latter, 'what leisure activities should I pursue?' As Dworkin writes, 'the scholar who values a life of contemplation has such a conception; so does the television-watching, beer-drinking citizen who is fond of saying "this is the life"' (Dworkin, 1978: 127; see also Jones, 1989: 13). Of course comprehensive doctrines may determine one's answer to ordinary questions and in this sense we might think of ordinary judgements as particular expressions or features of the comprehensive doctrine one supposedly holds. There is no normative reason why the state ought to be neutral about loftier, more philosophical ideas but not ordinary ones<sup>4</sup>. Likewise, it would make little sense to be neutral among ordinary judgements but favour (or hinder) a comprehensive view. As I

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<sup>3</sup> Several theoretical questions arise regarding the role of charities in our society. For instance, we would be inclined to ask what might be the role of charities in a society in which expenditure on health and education are some of the largest in the public budget. James Douglas addresses this question in *Why Charity?*, suggesting we require a third-sector as a response to market and state failure (Douglas, 1983). The validity of this gap-filling argument has been contested (Ware, 1989: 23-9), though Douglas himself concedes a full rationale needs to draw on, among other disciplines, political philosophy and the theories of distributive justice (Douglas, 1983: 160). We may also consider what benefit religious organisations bestow in a real *public* sense when the status of religion has shifted away from the social and political fabric to the private realm of citizens.

<sup>4</sup> Providing that all given ideas conform to liberal principles. This particular restriction is discussed in the final section of the paper.

hope to demonstrate in the following section, the categories of charitable purposes implicitly, and indeed sometimes explicitly, entail ideas about the good at both levels.

There are three broad conceptions of liberal neutrality in the literature: *neutrality of aim*, *of effect*, and *of justification*. The first requires that policymakers simply do not aim to promote or hinder conceptions of the good. Whether or not policy decisions have either effect is irrelevant provided it was not the aim behind the state's decision. The second requires that state decisions may draw on views about the good but must have a neutral effect on all concerned conceptions, amounting to an equal effect on conceptions. The third version requires that the justification for a given political decision does not draw on views of superiority or inferiority of conceptions of the good when justifying (or opposing) said decision. Often this third conception draws on contractualist methods, though in principle it need not. Neutrality of aim will not be considered here since it is thought neutrality of justification is its correct *liberal* interpretation (see Lecce, 2008: 237). Neutrality of justification is the favoured understanding of liberal neutrality among its contemporary adherents. That is not to say they share a common view on how the conception ought to be fleshed out. Nevertheless, at some level of political matters proponents of neutrality of justification share an anti-perfectionist stance. Perfectionism being the view that the state ought to promote conceptions of the good insofar as they are deemed *valuable* conceptions of the good (see Raz, 1986; Hurka, 1993; Sher, 1997).

In more recent years the 'asymmetry objection' has been the focus of the literature. The objection runs as follows: neutralists hold disagreements about the good to be 'reasonable' thus the state is not permitted to act on reasons grounded in conceptions of good. Yet the state is permitted to act on reasons of justice even though disagreements about justice are evidently reasonable. Critics argue that neutralists have failed to explain why then such a cut is warranted (see Sandel, 1982; Clarke, 1999; Chan, 2000). Neutralists have sought to defuse the objection in various ways. For example, Steven Lecce claims that critics are mistaken in their focus on specious epistemological differences between the good and justice. Rather, liberal neutrality is connected to moral equality and procedural constraints (Lecce, 2003 & 2008). Quong argues that disagreements about the good and justice differ in kind according to the respective premises shared by participants (Quong, 2005). Despite coming under strong criticism, in particular from perfectionists, it is safe to assume that neutrality remains a significant position in the liberal tradition. I wish to bracket some of these more technical concerns, such as the asymmetry problem, and use the existing literature as a starting point for an analysis of charity policy. Liberal neutralists have not tackled the issue of charity policy. Some writers have considered the issue of direct funding or subsidisation of certain goods by the state, in particular the arts (see Dworkin, 1985; Barry, 1995; Brighouse, 1995). While many UK charities do indeed receive subsidies or 'gift aid' from the state, the aforementioned literature does not consider the particular theoretical problem raised here.

### **Narrow Neutrality**

Charitable organisations are not an institution of the state; they are civil society organisations established under legal powers found in the legislation. How then does the neutralist understand legislation? Such an understanding is not unified among neutralists given that they disagree about the scope of neutrality. Here it is useful to distinguish a comprehensive neutrality principle from a narrow one. The narrow principle holds that the constitutional or basic framework should be neutral but other political decisions need not be. Whereas the former requires that both the basic structure and other political decisions should be neutral. In

this section I shall consider the narrow version, which tells us that non-neutral charity law need not concern us given that such legislation need not be neutral. Clearly we must address this point first given that if the argument were sound then the neutralist would not have a case to answer. This issue also leads well into a fuller explanation of what the problem for the neutralist is with regard to charity law.

### The Scope of Neutrality

Rawls can be read as defending narrow neutrality. The principle of neutrality is implicit in the construction of the principles of justice and for Rawls, 'the primary subject of justice is the basic structure of society, or more exactly...major social institutions' which he understands to be 'the political constitution and the principal economic and social arrangements' (Rawls, 1999: 6). Yet while it might be true for the principles of justice, it gives us no reason to assume that, for Rawls, neutrality itself does not go beyond the 'basic structure of society'. And elsewhere in *A Theory of Justice*, Rawls appears to exhibit an anti-perfectionist stance that goes further than the fundamentals of society. For example, he writes:

[T]he principles of justice do not permit subsidising universities and institutes, or opera and the theatre, on the grounds that these institutions are intrinsically valuable, and that those who engage in them are to be supported even at some significant expense to others who do not receive compensating benefits. (Rawls, 1999: 291-2)

Rawls maintains that if such subsidisation is acceptable then the taxes that support it must not be raised without consent. The argument is not directed at charitable status but it does show that Rawls, in some passages, explicitly rules out perfectionist public policies (Wall & Klosko, 2003b: 3)<sup>5</sup>. Barry's distinction between neutral and non-neutral political matters is more explicit than Rawls. It also lends itself well to our purposes here. Thus I will proceed with only Barry's account.

In *Justice as Impartiality*, Barry claims that principles of justice must be neutral between ideas about the good but other political decisions may appeal to such ideas. This rests, in part, on there being a conceptual distinction between justice-based and non-justice-based political matters. The constitutional framework is of course justice-based and so must be neutral between conceptions of the good. Whereas legislation in a variety of matters may, according to Barry, reflect some conceptions of the good. Thus there is an asymmetry of neutrality between issues of justice and other political issues. For instance, deciding the curriculum for state-run schools must inevitably entail a view about what is and is not worth learning. Barry asserts:

It would be absurd to suggest that there is some way of determining a curriculum that is neutral between all conceptions of the good, and it is significant that those who support the idea of legislative (as against constitutional) neutrality have never attempted to lay out a neutral curriculum. (Barry, 1995: 161)

Regardless of whether or not Barry is correct to suggest that many political decisions unavoidably turn on conceptions of the good, his claim does not serve as qualification of the *conceptual* distinction between the constitutional framework and various legislation issues. He must show that legislative decisions do not entail matters of justice.

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<sup>5</sup> Rawls appears to revise his position later, taking much the same stance as Barry (Rawls, 2005: 214-5).

Caney raises a problem for Barry in this regard that sheds light on the issue of whether or not charity law is beyond the scope of the principles of neutrality. For him the problem surfaces because ‘those matters Barry deems not to raise issues of justice frequently require financial support and thus inevitably raise issues of distributive justice’ (Caney, 2000: 105). Richard Arneson makes a similar case, specifically with regard to advancing the arts. He cautiously argues that it violates neutrality given the interference with citizens’ resources for the pursuit of a conception of the good that many may not wish to pursue (Arneson, 2003: 198-9). To illustrate let us consider some of the examples of non-neutral (and thus non-justice) legislation provided by Barry. He claims that legislation preserving buildings of historical importance, protecting areas of natural beauty and advancing the arts may legitimately draw on citizen’s views about the good (Barry, 1995: 105)<sup>6</sup>. Each of these policies, if they are to achieve their respective aims, must entail a financial cost that will typically require taxation. ‘People’s entitlements (their share of resources) are being affected by these other good-based policies. Judgements about the good are therefore influencing who gets what’ (Caney, 2000: 106). Thus, Barry’s distinction between justice-based and non-justice-based political decisions is undermined given that taxation is required to fund the legislation that reflects particular ideas about the good. Accordingly, the restriction of neutrality’s scope to only the constitutional framework is undermined by having accepted Barry’s linkage between justice and neutrality.

Let us now examine where charity law is situated in the above debate. We need to establish whether or not granting charitable status raises considerations of justice due to a financial cost that the taxpayer bears. It is important to note here that the nature of the charity case is somewhat different from the examples given above. The latter concerns the use of resources collected by the state, whereas in the case of charities it is mostly donations from citizens that fund the pursuit of their aims<sup>7</sup>. So what, if any, financial cost does the public bear? We may stretch Caney’s point so as to include tax expenditure. In this context that is to say, by granting an organisation fiscal advantages (such as tax exemptions) the state forgoes the tax it would have otherwise collected from the given organisation. Thus the resources available to individual citizens to pursue their own ideas of the good are more limited than if the state had chosen the alternative option of taxing charities. Thus, people’s entitlements remain affected by judgements about the worth of certain activities or ideas given that the state has detailed what is and is not a charitable purpose.

The above argument, if at all plausible, shows that charity in some sense concerns justice and so for supporters of Barry’s distinction, it should also concern the principle of neutrality. I wish to set aside this argument, however, for the following reason. I do not share Barry’s claim that neutrality is inextricably linked to only justice-related matters. While it is understandable that Barry argues that justice ought to be irrelevant to mundane legislation, it is not clear, as Quong argues, why we may not consider neutrality within non-justice spheres (Quong, 2004). Merely because such decisions *may* encounter conceptions of the good does not provide good reason to abandon neutrality in such contexts. It is difficult to see why the neutralist would ignore policies that contradict the heart of the neutrality doctrine. Such a tension arises between charity law and liberal neutrality, which ought to be of concern to the neutralist on his own terms.

Neutralists cannot ignore charity law when the value judgement entailed in recognising an organisation’s purposes as charitable is brought to light. When the state specifies what is

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<sup>6</sup> Note that these are in fact the sorts of activities that are deemed charitable.

<sup>7</sup> Statutory funding is a significant income for certain charitable sectors, such as employment and training (NCVO Almanac, 2010: 32). In which case the financial argument would apply as it is in Caney.

considered to be charitable it indirectly imparts a view about the value of activities or ideas (conceptions of the good). It informs us that the pursuit of a given set of conceptions of the good is worthy of special advantages that are not available for the pursuit of other conceptions. We need only look to the importance that charities holds in our society to recognise that affording charitable status is a significant statement of value. As the Charity Commission states, ‘charities play a vital and unique role at the heart of our society’, aiming in one sense or another to better society (Charity Commission, 2006). Hence, when the state deems an activity or idea as a charitable pursuit, it goes some way to predicating it as a *valuable* pursuit, or more valuable than other goals. Of course the state is not imposing conceptions of the good on other citizens, but it does facilitate organisations in the sense that they will find it easier to pursue their goals than had they not been granted charitable status and fiscal advantages. And so the value judgement also entails a practical consequence as such provisions help advance certain conceptions of the good.

In light of the above we can see that it is possible for charity law to contravene the basic premise of liberal neutrality. Recall that the general neutrality principle requires that the state be neutral between conceptions of the good, refraining from advancing or judging the value of particular conceptions of the good. So the problem arises in the current legislation given the predication of value that charitable status carries with it. The neutralist then cannot support an ad-hoc or separate account for charity policy given that the problem goes to the heart of the neutrality doctrine.

To provide some context to the problem let us now look at two examples of the categories of charitable purposes. Under the 2006 Act, the advancement of the arts is deemed to be charitable, including exhibiting art and the promotion of high standards of various artistic pursuits. Suppose that an organisation gains charitable status and fiscal advantages for its provision of a particular art form, say opera. Given the inherently subjective nature of art we can expect that a sizeable group of citizens do not view opera as valuable art, or at least not deserving of state facilitation. Consequently, the state appears to be discriminating between different views on a particular art form. Indeed some may hold the view that art altogether is not a feature of the good life yet the state appears to be facilitating, in a broad sense, the opposite view.

Consider also the category of the advancement of amateur sport where physical or mental skills are exerted to promote health. An amateur boxing club appears to meet the basic requirement of promoting health given the physical training involved in the sport, provided the associated risks were minimised. It seems plausible, however, that some people may object to the state facilitating an inherently violent sport. The current guidance provided by the Charity Commission for such cases involving dangerous sports brings to light a further complication. It states that in some cases an organisation may use a sport as a means of achieving a different purpose. ‘In that sort of case, the benefit to the public of the organisation’s object may outweigh the dangers inherent in the sport’ (Charity Commission, 2003). So, for example, we may conceive the boxing club as a source of engagement and cohesion particularly among young people in a relatively deprived community. But again, it is possible that people will dispute the merits of its method for achieving those goals. In reaching a decision one way or another, the state discriminates between ideas about the good.

## **Neutrality of Effect**



The neutrality of effect formulation is so-called because it views the impact that policies have on citizens' pursuit of their favoured conceptions of the good as the primary focus of the neutrality principle. It requires that the 'state should not do anything that has the effect – whether intended or not – of promoting any particular conception of the good, or of providing greater assistance to those who pursue it' (Wall & Klosko, 2003b: 8). This view is often thought to appeal to notions of equal treatment given that the state must not advantage some conceptions of the good *over others*. Alan Montefiore, for example, holds neutrality in this regard, stating that it is to do one's best 'to help or hinder to an equal degree the parties concerned in any situation of competition or conflict' (Montefiore, 1975: 6). Bringing these thoughts together, Jones writes:

We might therefore infer that, if a state is to remain neutral between individuals' conceptions of the good, it must promote these in equal degree or, perhaps, provide individuals with opportunities to promote these in equal degree. A state would therefore fail to be neutral to the extent that some citizens found their conceptions of the good less promoted, or less easily promoted, than those held by others. (Jones, 1989: 14-5)

Before we evaluate the above formulation some further clarification is required regarding its interpretation and application in the context of charities.

Any plausible interpretation of neutrality of effect would require that the state need only equally promote conceptions of the good actually held by citizens rather than the implausible case of every imaginable conception of the good (Jones, 1989: 14). In the context of the present charity law this is not a real concern given that the categories of charitable purposes plainly reflect conceptions actually held in society. A greater concern is whether or not the provisions under the 2006 Act do in fact have some bearing on how certain conceptions of the good fare in society. If such an effect does not occur then charitable status should not raise any concern for the neutralist. For the reasons set out in the previous section, charitable status and its associated fiscal advantages have the effect of increasing the promotion of the conceptions of the good reflected in the activities and ideas pursued by charities. As the Charity Commission states, '[t]here are considerable advantages which arise from charitable status: reputational – people are more likely to offer time, energy or money to a registered charity; opportunity – many grant-makers only give to charities; fiscal – charities receive a wide range of tax advantages' (Charity Commission, 2006). Charitable status gives rise to unequal treatment given that such provisions are desirable for citizens in pursuit of their conceptions of the good. Thus, conceptions of the good that are not reflected in the designated categories of charitable purposes are disadvantaged.

In light of the above it would appear there are two paths for the state according to neutrality of effect. One would be for the state to remove the provision of charitable status and tax exemptions in order to eliminate the advantages given to conceptions of the good that fall within the requirements of the 2006 Act. Surely we can reject this conclusion on the grounds that it would effectively bring an end to charitable organisations, at least insofar as being distinct from other private associations. The other possibility is that the state equally promotes conceptions of the good that are not afforded the advantages of being charitable. It would undermine the designation of charitable purposes to afford these other conceptions the same provisions so instead, for example, some form of compensation is required, such as financial support or special rights. I shall leave the notion of compensation defined in these loose financial terms since there is not the space here to develop the theory necessary for a full account. In principle there is no reason why such a theory could be constructed.

To measure the required level of compensation we need an understanding of what it means to equally promote conceptions of the good. Here the formulation encounters considerable difficulties. Waldron argues that the ‘main theoretical difficulty is that it involves the postulation of some baseline relative to which differential effects of legislation or other state action may be measured’ (Waldron, 1989: 67). Jones suggests a possible measure that appeals to a principle of equal fulfilment. We establish what the complete fulfilment of each conception of the good entails, ‘set out a scale of stages towards complete fulfilment, and then try to ensure that individuals were at the same point on that scale’ (Jones, 1989: 16). Jones goes on to point out, however, that such a measure would prove highly problematic for several reasons; for instance, the internal diversity of conceptions of the good is such that they are incommensurable. (Jones, 1989: 16). But supposing they are commensurable, what would this mean for the supposed conflict between neutrality and affording charitable status? I would argue that even if it were possible to equalise effects via compensation, neutrality of effect could not plausibly account for the initial value judgement that charitable status conveys. Consider the example of affording abortion advice centres charitable status. To equalise the effect of having facilitated the pro-choice conception the state may provide the necessary funds for anti-abortion groups to protest against the centre. I do not think such compensation, however, satisfies the problem put forward here. Compensation would not be a reply to anti-abortionists that argue such centres should not have been afforded charitable status in the first instance.

In any case, I am inclined to follow the widely held view that the general premise of neutrality of effect is an implausible and undesirable formulation of the principle (Jones, 1989: 16-17; Waldron, 1989: 67; Wall & Klosko, 2003b: 8; Lecce, 2008: 236). Most neutralists argue that it is not the remit of the state to regulate the success of conceptions of the good. What seems to be paramount to most contemporary neutralists is that the state provides a neutral justification for its policies. Rather than being only concerned about what effect policies have on conceptions of the good, we should be focussed on the content of the law in the first instance. In the next section I will examine how this position might work with regards to classification of charitable purposes under the *2006 Act*.

### **Neutrality of Justification**

The conception requires that policies pursued by the state should be justified independently of any appeal to the alleged superiority of conceptions of the good. In doing so, it does not invoke ‘controversial’ claims, namely, claims about the value of conceptions of the good that are reasonably objectionable to citizens. It should be noted, however, that most proponents of neutrality of justification do not invoke the idea that the neutrality principle is itself independent of conceptions of the good. As Wall & Klosko explain, ‘[n]o clear-headed proponent of state neutrality has ever claimed that the neutrality principle is itself morally neutral. As a moral principle, it is plainly incompatible with moral ideals that reject it’ (Wall & Klosko, 2003b: 12). Clearly the justificatory process will have an impact on the content of the policies that the state is permitted to pursue, and the different approaches to the process will alter the nature of that impact. I examine the approaches found in Rawls and Barry; they lend themselves well to my purposes as they provide different ways of squaring charitable purposes with neutrality of justification. If the purposes themselves were considered neutral then affording charitable status to organisations that pursue solely those purposes would not encounter the problem set out at the end of section two. The state would be facilitating the pursuit of goods that are neutral between conceptions of the good.

## Abstraction

As noted earlier, Barry asserts that it is not possible for the school curriculum to be neutral. He claims that it is absurd for it to be neutral since it must inevitably encounter ideas about the good. In response, Arneson argues that what Barry finds absurd is in fact entirely possible. He writes:

Given that what we have in mind is not neutrality of effect but neutrality of justification, we can fix a school curriculum by appealing only to neutral conceptions of people's individual rights coupled with uncontroversial ideas of the good. If everyone agrees that basic literacy and mathematical competency are good, we can appeal to the idea that it is fair that every person have fair opportunity to attain some reasonable threshold level of literacy and mathematical competence, and run public schools on this basis. (Arneson, 2003: 210)

Just as Arneson's suggestion would entail excluding contentious matters, like religious studies, from the curriculum, so too would the present list of charitable purposes require revision. It would require restricting the purposes to those we find uncontroversial. Some of the present categories do conform to this requirement such as general education, health and poverty, whereas categories like religion and the arts are likely to be disputed. Removing the latter purposes, particularly in the case of religious organisations, would require repealing the well-established common law legacy. The dilemma is between upholding the tradition to permit religious groups charitable status and the principle of liberal neutrality. Let us now turn to a possible solution found in Barry.

Though Barry is opposed to extending neutrality to non-justice-based issues, he does in fact provide us with a way of overcoming such disputes. As an illustration, take disagreements about which religion, if any, is true. How then is the state to establish freedom of religion without invoking judgements about the competing conceptions of the good in question? For Barry, we ought to establish a description of the good that is neutral between all disputants. Often this will mean abstracting the good to a level that neither promotes nor discourages specific conceptions. So the neutral description in this case would be the 'right to pursue one's religion'. The terms of the right do not invite disagreement as they make no reference as to the value of religious faiths. If it were described as "being saved from eternal damnation" then this is something we would all like to have done to us – but that description depends upon prior identification of the true religion' (Barry, 1995: 83). This would merely be framing the freedom in the terms of the original dispute.

Can we apply Barry's notion of neutral description to the charitable purposes found in the 2006 Act? The task is to specify charitable purposes in such a way that does invoke particular conceptions of the good in question. This will in some cases, of course, change the nature of the policy. For instance, the 'promotion of *high standards* of the arts' invites disagreement about what are 'high standards' and what artistic pursuits are capable of high standards. A neutral description would render it the 'the promotion of the arts' provided of course that what constitutes 'the arts' is not subject to differing conceptions of the good. The category concerning religious organisations, however, does not require revision. No specific religions are stated and the criteria are carefully formulated to be wholly inclusive of different faiths.

It is problematic, however, to abstract charitable purposes to a level of non-controversy in terms of adequately maintaining state neutrality. When affording charitable status and tax advantages, it would surely need to ascertain how a given organisation would go about pursuing the good in question so as to ensure it was not a specious claim. Indeed as it stands, a key role of the Charity Commission is to hold charities accountable to their donors, beneficiaries and the public (Charity Commission, 2006). For the question at hand, a specious claim is one that appeals to a broad neutral purpose but on closer inspection is in fact non-neutral. For example, were a charity to pursue 'good health' it would need to demonstrate how it intends to do so, such as researching causes and/or treatment of certain cancers or perhaps simply disseminating information on healthy diets. Simply abstracting the description of charitable purposes would allow an organisation to state its aims in particularly vague terms such as 'good health' then pursue a seemingly controversial and foreseeable interpretation such as homeopathy or other 'alternative' medicines. The state would thereby be affording privileges to organisations with non-neutral aims. In this sense abstract, broad categories are in fact self-defeating for state neutrality.

### Neutral Goods

I have argued that the existing categories of charitable purposes allow in some cases the state to affirm conceptions of the good that are reasonably objectionable for some, perhaps many, citizens. We may, however, set out goods that one would pursue even when placed in a position that is neutral between conceptions of the good. If charitable purposes were set according to these neutral goods the state would then not be seen to favour conceptions of the good held by some citizens but not others. Two possible ways of defining 'neutral goods' are goods that are 'generally accepted' or 'not reasonably objectionable'. The former would probably require a survey of people's values and beliefs; goods would then be neutral if they correlate with the goods people actually hold in society. Besides the immense practical difficulties this would entail, neutralists have theoretical reasons to dismiss defining neutral goods in such a way. One pitfall is that it opens the neutralist position to the challenge that it collapses into perfectionism. If goods are neutral merely because many people consider them to be valuable it appears we are making similar claims as the perfectionist with regards to the value of conceptions of the good.

The reasoning underlying the second definition helps differentiate neutrality from perfectionism as it sets certain constraints on what goods can be neutral independently of what people hold to be valuable. These constraints usually conform to liberal values hence racist and sexist views, for example, are precluded under the 'not reasonably objectionable' definition. I shall examine the issue of liberal values in more detail shortly. Of course it may (and often is) the case that 'generally accepted' and 'not reasonably objectionable' goods correlate, but the reasoning behind each is quite different. I think it is no coincidence then that neutralists generally hold 'not reasonably objectionable' as the definition of neutral goods. I shall follow the published literature in this respect.

A prominent example of neutral goods in the liberal tradition is Rawls' 'primary goods'. They include basic liberties opportunities, income, wealth and the social bases of self-respect (Rawls, 1999: 54-55; Rawls, 2005: 308-9). Following Norman Daniels, we may also include health here (Daniels, 1985: 42-48). Rawls labels these 'primary goods' as they are things that are 'supposed a rational man wants whatever else he wants' (Rawls, 1999: 79). It follows the neutrality of justification reasoning given that in the original position principles are chosen rationally but in ignorance of, among other things, one's conception of the good. Accordingly,

it is not possible to appeal to the superiority of particular conceptions of the good. I believe that the goods, arranged by the two principles of justice, to be applicable to charity law. Rawls' focus is the basic structure of society but in light of the problems of narrow neutrality we could use the notion of neutral goods to determine neutral categories of charitable purposes. An objection may be that primary goods should not apply to legislation concerning charity since, after all, they relate to principles of *justice*. Primary goods should be pursued as a matter of duty by the state, not voluntarily in the form of charitable organisations. That might be correct as an ideal, but in reality charities are often needed to provide services that the state is unable or unwilling to do so. People may well regret the need for charities to pursue these goods but presumably would not object to their efforts.

How then do we fashion charity law according to primary goods and what implications does this have for the existing legislation? In short, organisations that seek to promote primary goods would be candidates for charitable status. When taken in conjunction with the two principles, they are specific goods that are practicable as a set of charitable purposes; that is to say, they are not too abstract or vague. The promotion of basic rights and liberties would be one such purpose. This may entail, as the current law specifies, the raising of awareness of rights issues and securing their enforcement (Charity Commission, 2009). Indeed, this could be seen to sustain the existing category of the advancement of human rights as the two sets of rights broadly reflect one another. Interpreting the good of income or wealth as a charitable pursuit is somewhat less straightforward, but the advancement of distributing wealth to the least well off may well serve the difference principle. It seems plain to me that the present 'relief of poverty' category can be incorporated into this Rawlsian pursuit. Depending on one's account of the social bases for self-respect, it could give rise to many charitable pursuits; we can at least, I think, correlate it with the existing category of relief for those in need or hardship. A final example of the consistency between the current legislation and the Rawlsian version, albeit modified by Daniels, would be the advancement of health. Other categories that do not fall under the framework of primary goods could not be upheld on the basis that they do not meet the test of neutrality set out above. The legislation would have to be revised to remove such purposes as the promotion of the arts, amateur sport, animal welfare, moral improvement and spiritual welfare.

One may object to the removal of such categories on the grounds that competing conceptions of the good might still share the view that say, art or amateur sport, is better than no art or no amateur sport. Let us assume that it is agreed that art in society is better than no art in society. Thus we can be sure that it would not be reasonably objectionable were the state to encourage the arts by charitable recognition of art groups, providing they meet other legal requirements. This should not pose a problem for liberal neutralists given that public reason is unanimous in this case. However, while we may safely make the above assumption, it is not possible to be certain about what *kind* of art people view as valuable. After all, many people subscribe to the adage that 'there is no accounting for taste'. Thus, we must be less certain when facilitated art groups by the designation of charitable status. The neutralist then has two options: dismiss all arts as a charitable category or set out policies that make clear that all art groups, other legal considerations permitting, may potentially be charities. Whether some arts receive greater promotion as a result of charitable status is down to citizens' choice to form charities. Deciding between these two options depends on establishing that it is not reasonably objectionable that art is better than no art.

In *Political Liberalism* Rawls is quite explicit that *liberal* neutrality will indeed (and ought to) favour liberal values over other competing values (Rawls, 2005: 194). The prominence of

liberal values in the neutralist position should not be lost when considering charity law. Consider again the example of abortion advice centres. If their purpose were defined as open-minded information points that covered all possibilities and views on abortion then it would not be reasonably objectionable given that such a purpose conforms to core liberal values such as autonomy. We might suppose that some catholic groups, for example, would still object to centres purely on the basis that abortion is being affirmed as *an* option. But for the *liberal* neutralist this need not be of concern<sup>8</sup>. This example reveals that purposes that may appear reasonably objectionable can be reformed such that they are controversial in a non-problematic way for the neutralist. Though of course this is further modification of the existing charity law.

We should be cautious, however, about restricting charitable purposes according to Rawls' account given that they are indeed *primary* goods, intended to inform the arrangement of the basic structure. The existing legislation would perhaps fare better if we could establish a more general set of goods that were found to be uncontroversial between different conceptions of the good. Animal sanctuaries, for example, are not a primary good but I do not foresee them giving rise to disputes between conceptions of the good. Some may well insist, and reasonably so, that the relief of poverty or advancement of health is a more urgent pursuit, but this does not undermine an animal sanctuary being a viable neutral purpose. The urgency and extent to which purposes are pursued would be determined by the support received by the given organisations from the public. Provided we have sufficient grounds for assuming such purposes lend themselves to all concerned conceptions of the good, it seems satisfactory according to the general liberal doctrine to include them alongside primary goods.

## Conclusion

We return then to the methodological issue raised in the introduction; why then would the above serve as a satisfactory reconciliation between liberal neutrality and charity law? I have attempted to employ a version of reflective equilibrium, assessing the implications of each conception for both liberal neutrality and charity law. On the one hand, I have argued that certain proposals would alter the charity law to such an extent or in such a way that it is unacceptable. How can this be so? I have taken it for granted that we wish to preserve a vibrant charitable culture in the UK, and it is evident that charitable status is a valuable commodity to organisations. In this case liberal neutrality would have to be abandoned.

On the other hand, one might think the neutralist ought not to be forced into complete retreat in light of the tension with this particular policy. I argue that *insofar* as one is neutralist, one must accept that significant changes will have to be made to long-standing principles of charity law. Several categories would have to be removed on the basis that no practicable policy option can be found that passes the test of neutrality and/or many purposes would have to be characterised in such a way that is in tune with *liberal* neutrality. In this respect, a reconciliation point can be established.

The failure to account for charity law as it stands is, I think, because neutrality does not have the tools to account for embedded cultural values of society, of which the charitable sector appears to be a good example. After all, charity law and the charitable purposes therein are not the result of a radical or whimsical process. Rather the law is the culmination of traditions and principles of charitable activity that track the needs and culture of the day dating back to

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<sup>8</sup> Not least because Rawls and others assert the right to have an abortion (see Rawls, 2005: 243 fn. 32). It is a question of whether or not the advice centre is neutral about the *use of the right*.

the 1601 Act. Though the notion that the state must not predicate its decisions on the value of conceptions of the good may prima facie be sound, it loses its appeal where it radically alters well-established principles and values. Thus, if one holds dear the principles, traditions or intuitions of charity law then one ought to abandon liberal neutrality hitherto defended.

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